

University of Oklahoma College of Law

University of Oklahoma College of Law Digital Commons

American Indian and Alaskan Native Documents in the Congressional Serial Set: 1817-1899

2-15-1884

Letter from the Attorney-General, transmitting, in response to Senate resolution of February 5, copies of papers in his department relating to the case of Johnson Foster, a Creek Indian.

Follow this and additional works at: <https://digitalcommons.law.ou.edu/indianserialset>

 Part of the [Indian and Aboriginal Law Commons](#)

Recommended Citation

S. Exec. Doc. No. 105, 48th Cong., 1st Sess. (1884)

This Senate Executive Document is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in American Indian and Alaskan Native Documents in the Congressional Serial Set: 1817-1899 by an authorized administrator of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.

LETTER

FROM

THE ATTORNEY-GENERAL,

TRANSMITTING,

In response to Senate resolution of February 5, copies of papers in his Department relating to the case of Johnson Foster, a Creek Indian.

FEBRUARY 15, 1884.—Referred to the Committee on the Judiciary and ordered to be printed.

DEPARTMENT OF JUSTICE,
Washington, February 14, 1884.

SIR: In accordance with the resolution of the Senate of February 5, 1884, calling for copies of the correspondence between the Department of Justice and the Department of the Interior, concerning the case of Johnson Foster, a Creek Indian, I have the honor to forward herewith copies of all the papers on file in this Department relating to the matter, a list of which is appended.

Very respectfully,

BENJAMIN HARRIS BREWSTER,
Attorney-General.

The PRESIDENT OF THE SENATE.

LIST OF PAPERS FORWARDED.

- Secretary of Interior to Attorney-General, September 30, 1882.
- Acting Attorney-General to Secretary of Interior, October 2, 1882.
- Acting Attorney-General to United States attorney, Fort Smith, Ark., October 2, 1882.
- United States attorney, Arkansas, to Attorney-General, October 14, 1882.
- Acting Attorney-General to Secretary of Interior, October 19, 1882.
- Acting Secretary of Interior to Attorney-General, November —, 1882, with inclosures (H. Price, Commissioner, to Secretary of Interior, November 4, 1882; copies of two handbills; copies of two letters, Indian Agent Miles to Commissioner Price, September 20 and 23, 1882).
- Copy of decision of Judge Moody on demurrer to jurisdiction in case of Crow Dog.
- Acting Attorney-General to Acting Secretary of Interior, November 16, 1882.
- Secretary of Interior to Attorney-General, June 15, 1883.
- Opinion rendered June 27, 1883.
- Acting Secretary of Interior to Attorney-General, July 24, 1883, with inclosures from Indian Agent Miles, July 2, 1883; and letter of E. L. Stevens, Acting Commissioner, July, 1883.
- Attorney-General to Secretary of Interior, July 30, 1883.
- Attorney-General to United States attorney, Topeka, Kans., July 30, 1883.
- United States attorney, Kansas, to Attorney-General, August 14, 1883.

DEPARTMENT OF THE INTERIOR,
Washington, September 30, 1882.

SIR: I have the honor to invite your attention to the inclosed copy of a letter from the Commissioner of Indian Affairs of the 29th inst., together with copy of telegram from Agent Miles therein noted, reporting arrest and confinement at Fort Reno, Ind. T., of Johnson Foster (Creek), for murder of Robert Poisal (Arapahoe), and, in compliance with the Commissioner's recommendation, I have to respectfully request that the United States attorney for the western district of Arkansas may be directed to arrange for the removal of said Indian to Fort Smith, and take the proper action for bringing him to trial.

The honorable Secretary of War has been requested to direct the commanding officer at Fort Reno to hold the prisoner in custody until action can be taken by the United States attorney as above indicated.

Very respectfully,

H. M. TELLER,
Secretary.

The ATTORNEY-GENERAL.

DEPARTMENT OF JUSTICE,
Washington, October 2, 1882.

SIR: Acknowledging the receipt of your letter of the 30th ultimo, relative to the removal of Johnson Foster, a Creek Indian charged with the murder of Robert Poisal, from Reno, Ind. T., to Fort Smith, Ark., I have the honor to inform you that I have directed the district attorney for the western district of Arkansas, by letter of this date, to make arrangements for the removal, and to take the proper steps for bringing said Foster to trial.

Very respectfully, your obedient servant,

WM. A. MAURY,
Acting Attorney-General.

Hon. HENRY M. TELLER,
Secretary of the Interior.

DEPARTMENT OF JUSTICE,
Washington, October 2, 1882.

SIR: I inclose copy of a letter from the Secretary of the Interior, of the 30th ultimo, and the papers referred to by the Secretary.

In compliance with his request, you are hereby directed to arrange for the removal of Johnson Foster, a Creek Indian, charged with the murder of Robert Poisal, an Arapahoe Indian, to Fort Smith, and you will take the proper steps to bring said Foster to trial.

Very respectfully,

WM. A. MAURY,
Acting Attorney-General.

W. H. H. CLAYTON, Esq.,
United States Attorney, Fort Smith, Ark.

FORT SMITH, ARK., October 14, 1882.

SIR: I have the honor to acknowledge the receipt of your favor of the 2d instant inclosing copy of a letter from the honorable Secretary of the Interior relating to the removal of Johnson Foster, a Creek Indian, charged with the murder of Robert Poisal, an Arapahoe Indian, from Fort Reno to Fort Smith for trial.

Permit me to call your attention to the fact that the party charged with the murder and the deceased are *both Indians*. Under the intercourse laws we only have jurisdiction over those offenses when one or both of the parties are *not Indians*. Our jurisdiction for the trial of the offense of murder is derived from sections 5339, 2145, and 2146, Revised Statutes. By section 2146 it is provided that the jurisdiction of our court does not extend "to crimes committed by one Indian against the person or property of another Indian."

The fact that these two Indians belong to different tribes makes no difference, because the statute is general, covering all the tribes. In cases of this kind the trial and punishment of the offender is left to the Indians themselves.

If I send for this man, in accordance with your directions, it can but result in his

release, because the question of jurisdiction will certainly be raised, and as certainly be found against us.

I have thought it best to lay this matter before you and await your further instructions.

Very respectfully,

WM. H. H. CLAYTON,

United States Attorney, Western District of Arkansas.

The ATTORNEY-GENERAL.

DEPARTMENT OF JUSTICE,
Washington, October 19, 1882.

SIR: Referring to your letter of the 30th ultimo, and the answer thereto dated October 2, relative to the removal of Johnson Foster, a Creek Indian, charged with the murder of an Arapahoe Indian, to Fort Smith for trial, I have the honor to transmit herewith a copy of a letter of the 14th instant, from the United States district attorney for the western district of Arkansas, in which letter he cites section 2146 Revised Statutes, which, as he thinks, forbids the trial in a United States court of an Indian for crime committed against the person or property of another Indian, although they may not be of the same tribe; and that therefore, if Foster were arraigned for the crime of murder in the United States court at Fort Smith he will necessarily be released.

If this opinion is correct, as I am inclined to think it is, it would be a useless expense to transport the said Indian to Fort Smith.

I await an expression of your views, before further instructing the attorney.

Very respectfully,

S. F. PHILLIPS,

Acting Attorney-General.

Hon. H. M. TELLER,
Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
Washington, November —, 1882.

SIR: Referring to your letter of the 19th ultimo, in relation to the removal of Johnson Foster, a Creek Indian, charged with the murder of an Arapahoe Indian, to Fort Smith for trial, I have the honor to transmit herewith a copy of report dated 4th instant, from the Commissioner of Indian Affairs, to whom the matter was referred, with accompanying papers therein noted.

Very respectfully,

M. L. JOSLYN,

Acting Secretary.

The ATTORNEY-GENERAL.

DEPARTMENT OF THE INTERIOR, OFFICE OF INDIAN AFFAIRS,
Washington, November 4, 1882.

SIR: I have received by Department reference, for report, a letter from the honorable Attorney-General, dated the 19th ultimo, inclosing one from the United States attorney for the western district of Arkansas, dated the 14th ultimo, wherein, referring to the removal of Johnson Foster, a Creek Indian, charged with the murder of Robert Poisal, a half-breed Arapahoe, to Fort Smith for trial, he calls attention to the fact that the party charged with the murder and the deceased are both Indians, although of different tribes, and that under section 2146 Revised Statutes, the jurisdiction of the United States court does not extend "to crimes committed by one Indian against the person or property of another Indian," but that in such cases the trial and punishment of the offender is left to the Indians themselves.

The United States district attorney further remarks that if he sends to Fort Reno for the prisoner, it can but result in his release, because the question of jurisdiction will certainly be raised, and as certainly be found against the Government. Under these circumstances, he awaits further instructions from the Department of Justice.

Admitting the correctness of the general proposition of law advanced by the United States District attorney, it is a question whether there are not features in this case which tend to remove it from the operation of the general law and render the offender amenable to the laws of the United States for the punishment of crimes committed in the Indian country.

The jurisdiction of the United States court for the western district of Arkansas, for the trial of the offense of murder in the Indian Territory, is derived from sections 2145, 2146, 5339, United States Revised Statutes.

Section 2145 reads as follows:

"Except as to crimes the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."

Section 2146 provides:

"The preceding section shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country, who has been punished by the local law of the tribe, or to any case where by treaty stipulations the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

Section 5339 enacts:

"Every person who commits murder * * * within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States, * * * shall suffer death."

From a very early period it appears to have been the policy of the Government, growing out of the practice of treating with the Indian tribes as separate or independent nations, not to take cognizance in the United States courts of offenses committed by one Indian against the person or property of another Indian.

Enactments expressive of this policy appear as early as March 3, 1817 (3 Stat., 383), and from that date to the present time there has remained on the statute-books an express provision to that effect, except between the date of the repealing act June 22, 1874 (Sec. 5395, *et seq.*), and the amendatory act of February 18, 1875 (18 Stat., 316).

In the first edition of the Revised Statutes the following words were omitted from section 2146, viz, "crimes committed by one Indian against the person or property of another Indian."

By the amendatory act of February 18, 1875, these words were again restored and incorporated in section 2146.

From the wording of the repealing clause of said act of June 22, 1874, and the amendatory act of February 18, 1875, it is manifest that such omission was an error, and unintentional.

The repealing clause reads as follows:

"All acts of Congress passed prior to said first day of December, 1873, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof; all parts of such acts not contained in such revision having been repealed or superseded by subsequent acts, or not being general or permanent in their nature. * * *"

The act of February 18, 1875, expressly provides that it is enacted for the purpose of correcting errors and supplying omissions in the revision, "so as to make the same truly express such laws."

In the case of the United States *vs.* "Crow Dog," a Sioux Indian, indicted at the January term, 1882, of the United States court for the first judicial district of the Territory of Dakota, for the murder of "Spotted Tail," also a Sioux Indian, United States District Judge Moody, upon demurrer to the indictment, was of opinion that the statutory provision exempting Indians from punishment for crimes committed against other Indians was in its nature general and permanent, and had never been repealed, so far as its general applicability was concerned. The question now recurs, as it did in the case cited, upon the intention of Congress in re-enacting such provision with reference to special provisions forming exceptions to the general rule, embodied in the treaties with certain Indian tribes.

The parties in this case are, respectively, the murdered man, a half-breed Arapahoe (whether Northern or Southern Arapahoe, does not appear); the murderer, a Creek Indian.

Article 1 of the treaty between the United States and the Southern Cheyenne and Arapahoe Indians, concluded October 28, 1867, duly ratified and proclaimed (15 Stat., 593), reads as follows:

"If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offenders to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained."

The treaty with the Northern Cheyenne and Northern Arapahoe Indians, May 10, 1868, duly ratified and proclaimed (15 Stat., 655), contains the same declaration.

The Constitution of the United States declares a treaty to be the supreme law of the land, and in *Foster v. Nelson* (2 Peters 314), the court held that "a treaty is to be regarded in cases of justice as equivalent to an act of legislature, whenever it operates of itself without the aid of any legislative provision." No legislation is required to put the above cited clause of the treaties in force.

By sundry legislative provisions and by many acts of appropriation Congress has

recognized these treaties as having the force of law, and by the act of March 3, 1871 (16 Stat., 566), it affirmed the obligations of all treaties with the Indian tribes theretofore lawfully made and ratified.

By the first article of the treaty between the United States and the Creeks and Seminoles, concluded August 7, 1856, duly ratified and proclaimed (11 Stat., 699), the Creek Nation ceded to the Seminole Indians the tract of country included within the following boundaries, viz:

"Beginning on the Canadian River, a few miles east of the ninety-seventh parallel of west longitude, where Ock-hi-appo or Pond Creek empties into the same, thence due north to the North Fork of the Canadian; thence up said North Fork of the Canadian to the southern line of the Cherokee country; thence with that line west to the one hundredth parallel of west longitude; thence south along said parallel of longitude to the Canadian River, and thence down and with that river to the place of beginning."

Article XV, of the same treaty provides:

"So far as may be compatible with the Constitution of the United States, and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Creeks and Seminoles shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property within their respective limits. * * *"

By article III, of the treaty between the United States and the Seminole Indians, March 21, 1866, duly ratified and proclaimed (14 Stat., 756), the Seminoles ceded to the United States their entire domain, being the tract of land ceded to the Seminole Indians by the Creek Nation under the provisions of the treaty with the Creeks and Seminoles of August 7, 1856. By the same article the United States granted to the Seminole Nation for national domain a portion of the lands obtained by grant from the Creek Nation, bounded and described as follows:

"Beginning on the Canadian River where the line divided the Creek lands according to the terms of their sale to the United States by their treaty of February 6, 1866, following said line due north to where said line crosses the North Fork of the Canadian River; thence up said North Fork of the Canadian River a distance sufficient to make 200,000 acres by running due south to the Canadian River; thence down said Canadian River to the place of beginning."

I have purposely given the boundaries of the Creek and Seminole countries as now existing, in order to show that the offense in question was not committed within either of those countries, and that neither of those nations has jurisdiction under the fifteenth article of the treaty of 1856, before cited, which is still in force.

The murder was committed in that part of the Indian Territory in what is known as the Pottawatomie country, on the Shawnee road, about 45 miles east of the Cheyenne and Arapahoe Agency, and about 20 miles west of the Kickapoo village. (See location designated on inclosed map.)

The clause in the treaty with the Cheyennes and Arapahoes, under which it is contended that the United States has jurisdiction of the offense committed, provides—

"If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrongs," &c. (See ante, page 6.)

That the Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of any one of the States, Congress may by law punish any offense committed there, no matter whether the offender be a white man or an Indian, is too firmly and clearly established to admit of doubt. (U. S. vs. Rogers, 4 Howard, 572.)

In the case of Crow Dog, before referred to, the question of jurisdiction of the United States court over the offense arose under the provisions of article 1 of the treaty with the Sioux Indians, April 29, 1868 (15 Stat., 635), which declared that "if bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent and notice by him, deliver up the wrongdoer to the United States to be tried and punished according to its laws." * * *

After reciting the various acts of Congress heretofore cited, United States District Judge Moody held as follows:

"This treaty of 1869 then took this tribe and these Indians out of the operation of the general law and made them amenable to the laws of the United States punishing crimes committed in the Indian country, whether the crime was committed upon the person of a white man, a black man, or an Indian, and such is still their condition unless the clause I have referred to of the treaty has been in some way abrogated or repealed.

"It is claimed by defendant's counsel that by operation of the act of February 18, 1875, re-enacting the omitted clause and again putting into the statute the exemption from punishment of an Indian who commits a crime against another Indian, this and all similar to clauses in other Indian treaties were repealed.

"We are precluded from arriving at such a conclusion by the rule of interpretation, well settled and universally recognized, that an express law or the stipulations of a special law or treaty conferring certain exceptions is never to be held repealed by implication by a general law, unless the intent to repeal be clear and unmistakable, or unless there is such a clear repugnancy that both cannot stand together.

"In this case both may stand, one as the general rule and the other as the exception.

"Besides, it is manifest from the manner and purpose of this amendment, as I have before given them, that it was not the intention of Congress to create any new rule or to repeal any former special law or treaty, but simply to continue in force the former general law, which had inadvertently been changed, leaving the exceptions thereto to operate with full force.

"However, we are not left even to this rule of interpretation, for by an examination of the concluding provisions of section 5596 of the United States Revised Statutes, it being the repealing provision I have before spoken of, it will be seen that it was not the intention to repeal, affect, or change any law of Congress or any treaty having the force of such enactment of a local character, or of which no part is embraced in said revision.

"Therefore, I am clearly of the opinion that this defendant is legally subject to be put upon trial for the crime alleged in this indictment.

"The point made by counsel that it is not alleged that the person killed, Spotted Tail, was subject to the authority of the United States, is sufficiently answered by saying that it does not appear that he was an Indian of the Brule Sioux band of the Sioux nation of Indians, was at peace with the United States, and was within the district and upon the reservation of that tribe.

"The public treaties with those Indians show them to be subject to such authority as all are who are within the territorial limits of the United States. Indeed it does appear that the person killed was one of the principal chiefs of that band, and signed the treaty. Chief Justice Taney says in the United States v. Rogers (4 Howard, 572), 'We think it too firmly established to admit of dispute that the Indian tribes residing within the territorial limits of the United States are subject to their authority.'

"I therefore conclude that this court has jurisdiction of the offense charged in the indictment of the person of the defendant, and that the indictment is sufficient.

"The demurrer is overruled and the defendant has leave to plead over to said indictment." (See copy text, unofficial, of Judge Moody's decision, herewith.)

The prisoner (Crow Dog) was tried and convicted, and the case was afterwards appealed to the supreme court of the Territory. If the views of Judge Moody as to the effect of the clause, in the Sioux treaty, to remove them from the operation of the general law, and make them amenable to the laws of the United States punishing crimes committed in the Indian country, whether upon the person of a white man, a black man, or an Indian are correct, I think it may be fairly argued (assuming the words, "or among other people subject to the authority of the United States," to be held to include Indians) that the protective clause, in which the above words occur, of the treaties with the Cheyennes and Arapahoes should have a like effect to clothe the United States court with jurisdiction of the offense in question, and, in view of the apparently unprovoked and wanton character of the crime with which the prisoner stands charged, I have deemed it my duty to submit the foregoing points for your consideration, and that of the honorable Attorney-General.

If the jurisdiction of the United States court over the case cannot be maintained, there is, of course, no alternative but to remit the offender to the Indians themselves for trial and punishment, although I am not aware of any compact between the Creeks and Arapahoes by which a fair trial can be had.

The deceased is represented as being a half-breed Arapahoe Indian. As to the status of half-breeds, I beg to call attention to the opinion of Mr. Attorney-General Cushing (7 Opin., 746), wherein he held that half-breed Indians are to be treated as Indians of the full blood in all respects, so long as they retain their tribal relations.

The letter of the honorable Attorney-General is herewith returned, and a copy of this report is inclosed. I also transmit copies of Agent Miles's letters detailing the circumstances of the murder.

Very respectfully, your obedient servant,

H. PRICE,
Commissioner.

The SECRETARY OF THE INTERIOR.

[Copy of handbill.]

Six hundred dollars reward will be paid by the undersigned for the arrest of Johnson Foster, dead or alive, the murderer of Robert Poisal, who was shot down in cold blood on Monday, September 18, 1882, while driving along the road in the Shawnee country, near Widow Deer's ranch, by a young Creek Indian, eighteen or twenty years old, sharp featured and very dark complexioned. When last seen had on black slouch hat, common slicker coat, jeans pants, and hickory shirt.

The above money has been subscribed by the citizens of this country for the apprehension of the murderer, dead or alive, and is in my hands.

JOHN D. MILES,
U. S. Indian Agent.

CHEYENNE AND ARAPAHOE AGENCY,
Darlington, Ind. T., September 22, 1882.

[Copy of handbill.]

IMMEDIATE ACTION.

The citizens of this part of the Territory owe it to their own safety and the respect due their murdered fellow-citizen, Robert Poisal, that the murderer be brought to justice.

☞ With a view toward this end subscription lists are now open at the post-trader's store of N. W. Evans & Co., at Fort Reno, and at the Indian trader store of T. Connell and L. Candee, at Darlington.

☞ Immediate action is necessary in order that handbills offering the proceeds of the subscription for the apprehension of the murderer, dead or alive, may be printed and circulated at once.

☞ Every friend of law and order is invited to subscribe his share to the common fund at one of the above-named places.

FORT RENO, IND. T., September 19, 1882.

(\$200 already raised.)

UNITED STATES INDIAN SERVICE,
CHEYENNE AND ARAPAHOE AGENCY,
Darlington, Ind. T., September 20, 1882.

SIR: It becomes my duty to report the murder of Robert Poisal, a half-breed Arapahoe Indian of this agency, on the 18th instant.

Mr. Poisal, with his niece, Mrs. Jennie Meagher, were returning in a wagon from the Sacred Heart Mission, in the Pottawatomie country, about 140 miles southeast from this agency, where they had been placing some of their children in that school. Mrs. Meagher now reports that on the 18th instant, as they were traveling through timber on their way home, they saw an Indian (dressed after the manner of Shawnees, Kickapoos, Creeks, and others) standing by a tree at the roadside holding in his hands a muzzle-loading rifle. When about opposite the man he fired, killing Mr. Poisal instantly. Mrs. Meagher was sitting on the same seat, and she thinks the Indian intended to kill the two at one shot. She seized the lines and drove as fast as she could, calling for help with almost every breath, and succeeded in reaching a ranch without further molestation. This occurred about 45 miles east of this agency and about 20 miles from the Kickapoo village. The murder is a mystery to us all.

I at once called on the commanding officer at Reno for assistance in an attempt to secure the murderer, and a detail of troops and some citizens are now out scouring that country, and may get a clue. Some of our Indians, as also some of the employees of the agency and Fort Reno, are inclined to the belief that the murder was committed by some of the Creeks who are known to be in that country and looking for blood. Should the Arapahoes become convinced that Mr. Poisal had been murdered by the Creeks it would be sure to create trouble with the party of Creeks now there.

Very respectfully,

JOHN D. MILES,
Indian Agent.

Hon. H. PRICE, Commissioner, Washington, D. C.

UNITED STATES INDIAN SERVICE,
CHEYENNE AND ARAPAHOE AGENCY,
Darlington, Ind. T., September 23, 1882.

SIR: Referring to my letter of 20th instant, reporting the murder of Robert Poisal, a half-breed Arapahoe, I have the honor to report that the party sent out to investigate returned last evening and report that the murder was committed in cold blood, and unprovoked, by a Creek Indian in the Shawnee country, whose name is Johnson Foster, believed to be about 18 or 20 years old. I inclose "handbill" which gives full description of murderer and offering a reward of \$600 for his arrest, which will be extensively circulated.

I would respectfully ask that the principal chief of the Creek Nation be called upon for the surrender of the murderer to the proper officers in order that the guilty party may be punished. The Arapahoe young men are anxious to engage in the search for the party, but I think best to restrain them.

Very respectfully,

JNO. D. MILES,
Indian Agent.

Hon. H. PRICE,
Commissioner, Washington, D. C.

TERRITORY OF DAKOTA,
First Judicial District, ss :

In district court exercising jurisdiction of a district and circuit court of the United States.

UNITED STATES

vs.

KAN-GI-SHAN-CI, otherwise in English called Crow Dog.

} Indictment for murder.

Hugh J. Campbell, esq., United States attorney for the United States. A. J. Plowman, esq., counsel for the defendant.

Decision of the court upon the defendant's demurrer to the indictment.

Moody, Judge.—At the present term of this court the defendant, Kan-gi-shan-ci, otherwise in English called Crow Dog, was indicted for the murder of one Sin-ta-gel-scha, otherwise in the English language called Spotted Tail, which murder it is alleged in the indictment was committed at the Rosebud Agency upon the Sioux Reservation in the Indian country, within this judicial district, on 5th day of August, 1881.

From the indictment it appears that both of these persons were Indians belonging to the Brule Sioux band of the Sioux Nation of Indians; that the killing took place at their agency, and that the person killed was then at peace with the United States.

The defendant demurs to the indictment, and objects to the sufficiency thereof and to this court taking cognizance of the offense therein alleged, upon the ground that it appears upon the face of the indictment that the offense therein charged was a crime committed by one Indian against another Indian.

The counsel for the defendant in support of the demurrer relies upon the exception contained in section 2146 of the Revised Statutes of the United States, excepting from the crimes act which is extended to the Indian country by section 2145 of said United States Statutes, crimes committed by one Indian against the person of another Indian. Section 2145 reads as follows:

"Except as to crimes, the punishment of which is expressly provided for in this title the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."

Section 2146 provides: "The preceding section shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulation, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

One of the crimes, the punishment for which was thus, by section 2145, provided for when committed in the Indian country, is the crime of murder.

It has undoubtedly been the policy of the Government, applied as a general rule from a very early period in its history, not to take cognizance through its courts of offenses committed by one Indian against the person or property of another Indian. This policy of the Government grew out of, in part at least, the practice of treating with the Indian tribes as independent or dependent nations or communities, a practice

which continued, though latterly often assailed, until absolutely prohibited by act of Congress in 1871.

We find enactments expressing this policy as early as March 3, 1817, and from that date down to this there has remained in the statutes an express enactment to this effect, save between June 22, 1874, and February 18, 1875.

In the first edition of the United States Revised Statutes, by an evident unintentional omission, these words were left out of section 2145, to wit: "Crimes committed by one Indian against the person or property of another Indian."

But shortly after the passage of the repealing act of June 22, 1874, and on the 18th of February, 1875, these words were again restored to the law and incorporated into said section.

From the wording of the repealing clause of said act of June 22, 1874, and of the amendatory act of February 18, 1875, I think I am entirely correct in the conclusion that such omission was evidently an error and unintentional. The repealing clause spoken of reads thus:

"All acts of Congress passed prior to said first day of December, 1873, any portion of which is embraced in any section of said revision, are hereby repealed, and the portion applicable thereto shall be in force in lieu thereof. All parts of such acts not contained in such revision having been repealed or superseded by subsequent acts, or not being general or permanent in their nature."

Now, this provision exempting Indians from punishment for crimes committed against other Indians was in its nature general and permanent, and has never been repealed, so far as its general applicability was concerned.

Again, the act of February 18, 1875, expressly provides that it is enacted for the purpose of correcting errors and supplying omissions in the revision, so as to make the same truly express such laws.

I have dwelt somewhat upon this because I think it has an important bearing upon the question of the intention of Congress in re-enacting such provision so far as it affects the special provisions of the Brule Sioux treaty hereinafter considered.

I have said the general policy of the Government enforced by general enactments was not to take cognizance by its laws of crimes committed by one Indian against another. But there were from time to time exceptions to this general rule embodied in treaties with the Indian tribes, though my attention has not been called to any reported case where the question similar to the one before me was raised or adjudicated.

By the treaty between the United States and the different tribes of Sioux Indians, among which tribes was the Brule Sioux band to which these Indians belonged, proclaimed February 24, 1869 (15 Stat., 635), it was expressly provided that if "bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws."

That this treaty had the force and effect of a law of the United States is too well settled and too universally recognized to need argument or the citation of authority.

The constitution declares a treaty to be the supreme law of the land, and Chief Justice Marshall, in *Foster vs. Neilson*, 2 Peters, 314, said "that a treaty is to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision."

No legislation is required to put this clause of the treaty in force.

By numerous legislative provisions and by many acts of appropriation, Congress has recognized this treaty as having the force of law, and by the act of March 3, 1871, has recognized the obligations of this and all treaties with the Indian tribes theretofore lawfully made and ratified. (*United States vs. 43 gallons whisky, &c.*, 93 U.S., 188, and cases there cited.)

That Congress may by law punish any offense committed in the Indian country and not within the limits of the States, no matter whether the offender be a white man or an Indian, is too firmly and clearly established to admit of dispute. (*United States vs. Rogers*, 4 Howard, U. S., 572.)

This treaty of 1869 then took this tribe and these Indians out of the operation of the general law and made them amenable to the laws of the United States, punishing crimes committed in the Indian country, whether the crime was committed upon the person of a white man, a black man, or an Indian; and such is still their condition, unless the clause I have referred to of the treaty has been in some way abrogated or repealed.

It is claimed by defendant's counsel that by operation of the act of February 18, 1875, re-enacting the omitted clause and again putting into the statute the exemption from punishment of an Indian who commits a crime against another Indian, this and all similar clauses in other Indian treaties were repealed.

We are precluded from arriving at such a conclusion by the rule of interpretation,

well settled and universally recognized, that an express law or the stipulations of a special law or treaty conferring certain special rights or privileges, or creating certain exceptions, is never to be held repealed by implication by a general law, unless the intent to repeal be clear and unmistakable, or unless there is such a clear repugnancy that both cannot stand together.

In this case both may stand, one as the general rule and the other as the exception.

Besides, it is manifest from the manner and purpose of this amendment, as I have before given them, that it was not the intention of Congress to create any new rule or to repeal any former special law or treaty, but simply to continue in force the former general law which had inadvertently been changed, leaving the exceptions thereto to operate with full force.

However, we are not left even to this rule of interpretation, for by an examination of the concluding provisions of section 5596 of the United States Revised Statutes, it being the repealing provision I have before spoken of, it will be seen that it was not the intention to repeal, affect, or change any law of Congress or any treaty having the force of such enactment of a local character or of which no part is embraced in said revision.

We find also by referring to article 8 of the subsequent agreement made with the same tribe of Indians, approved by act of Congress February 23, 1877 (19 Stat., 254), it is expressly provided that "the provisions of the said treaty of 1868" (proclaimed February 24, 1869), "except as herein modified, shall continue in full force." "They" (the said Indians) "shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life."

No modification was by such subsequent agreement made in the clause I have quoted from the treaty proclaimed February 24, 1869. This would operate to revive the provisions of the treaty of 1869 I have spoken of even if they could be construed as repealed by the amendatory act of February 15, 1875, and this further enforces the stipulation that they shall be subject to the laws of the United States. Therefore I am clearly of the opinion that this defendant is legally subject to be put upon trial for the crime alleged in this indictment.

The point made by counsel that it is not alleged that the person killed, Spotted Tail, was subject to the authority of the United States, is sufficiently answered by saying that it does appear that he was an Indian of the Brule Sioux band of the Sioux Nation of Indians, was at peace with the United States, and was within this district and upon the reservation of that tribe.

The public treaties with those Indians show them to be subject to such authority, as all are who are within the territorial limits of the United States. Indeed it does appear that the person killed was one of the principal chiefs of that band and signed the treaty. Chief Justice Taney says, in the United States *vs.* Rogers, 4th Howard, 572: "We think it too firmly established to admit of dispute that the Indian tribes residing within the territorial limits of the United States are subject to their authority."

I therefore conclude that this court has jurisdiction of the offense charged in the indictment of the person of the defendant, and that the indictment is sufficient.

The demurrer is overruled and the defendant has leave to plead over to said indictment.

DEPARTMENT OF JUSTICE,
Washington, November 16, 1882.

SIR: I have the honor to acknowledge the receipt of your letter of the 7th instant, inclosing a communication of the 4th instant from the Commissioner of Indian Affairs, and other papers relating to the removal of Johnston Foster, a Creek Indian, to Fort Smith, Ark., to be tried by the United States court, at that place, upon the charge of murdering an Arapahoe Indian.

The Commissioner controverting the opinion of the district attorney for the western district of Arkansas, takes the position that, by virtue of the second clause of the treaty concluded October 23, 1867, between the United States and the Southern Cheyenne and Arapahoe Indians (15 Stats., 593), the case of Foster is excepted from the general law as expressed in section 2146, Rev. Stats. (that crimes committed by one Indian against another are not cognizable by the courts of the United States), and that the court holding its sessions at Fort Smith can take jurisdiction of the case. The Commissioner cites the case of "Crow Dog," recently tried in the first judicial district of Dakota Territory, and quotes from the opinion of Judge Moody as to the jurisdiction.

Foster's case is not in all respects parallel with that of Crow Dog. In the latter, the crime was committed upon the reservation, and at the agency of the tribe with which a treaty (containing a similar provision) was in force; in the former, the crime was committed upon the territory of the Pottawatomies the treaty with which contains no such provision.

The question, notwithstanding the decision in the Crow Dog case, is by no means

free from doubt. That case will probably go to the Supreme Court, and it is yet uncertain how it will be finally decided.

Moreover, Mr. Clayton, the district attorney, not improbably represents the sentiment of the court in Arkansas.

Upon the whole, I regard the question of the jurisdiction of that court over the case of Foster as so doubtful that it is inexpedient in my judgment to incur the expense of his removal and trial at Fort Smith.

Very respectfully,

S. F. PHILLIPS,
Acting Attorney-General.

Hon. M. L. JOSLYN,
Acting Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
Washington, June 15, 1883.

SIR: I have the honor to transmit herewith a copy of report of the Commissioner of Indian Affairs, presenting the complications surrounding the case of Johnson Foster, a Creek Indian, confined in the military guard-house at Fort Reno, Ind. T., charged with the murder of Robert Poisal, a half-breed Arapahoe, in the Pottawatomie country, on September 18, 1882.

The Commissioner of Indian Affairs requests that you reconsider your opinion of the 16th November, 1882 (letter-book), that the question of jurisdiction of the United States court at Fort Smith, Ark., over the case was regarded by you as so doubtful that in your judgment it was inexpedient to incur the expense of removal and trial of the prisoner.

While the crime charged was by one Indian against another, the murdered Indian did not belong to the same tribe to which the murderer belongs, and neither of them belonged to the tribe in whose country the crime was committed.

These facts present a case which appears not to be within the jurisdiction of any of the Indian tribes in any way connected with it under the laws and treaties governing them.

The question is presented in this case also, as to whether the provision of section 2146, Revised Statutes, exempting from the jurisdiction of courts of the United States "crimes committed by one Indian against the person or property of another Indian" extends to all crimes thus committed, whether they be by one Indian against the person or property of another Indian of the same tribe or of some other tribe.

The matter is respectfully presented for your further consideration, with request that you favor this Department with your opinion as to what, under the circumstances, should be done with the prisoner.

Very respectfully,

H. M. TELLER,
Secretary.

The ATTORNEY-GENERAL.

DEPARTMENT OF JUSTICE,
Washington, June 27, 1883.

SIR: Yours of the 15th instant calls attention again to the case of Foster, a Creek Indian, who is in custody at Fort Reno, under charge of murder of one Poisal, an Arapahoe, at a place within the Pottawatomie Reservation in the Indian Territory, the same matter having been the subject of correspondence between the Attorney-General and the Secretary of the Interior during November last.

Calling my attention to the difficulties of the case, as regards jurisdiction by any Indian tribe, as well as the outrageous character of the homicide, you ask that, in connection with the case of Crow Dog, in the courts of Dakota Territory, I will reconsider the question of jurisdiction by the United States; and also that if I adhere to the intimations heretofore given I will advise you as to the proper disposition to be made of Foster.

1. I have reconsidered the matter as you request, and am still of opinion that there is but little ground to hope that the courts of the United States have jurisdiction of the offense in question.

That offense is the murder of one tribal Indian by another; their tribes being different, and the murder having been committed within the reservation of a third tribe, which is said to have no law covering the case.

Before going further, I may here, apropos of a suggestion in your note, call attention that, in Roger's case, 4 How., 567, Chief Justice Taney says that the act of 1834

"does not speak of members of a tribe, but of the race generally, of the family of Indians; and it intended to leave them, both as regards their own tribe and other tribes also, to be governed by Indian usages and customs."

It is admitted that the United States have no jurisdiction over crimes committed by one Indian against the person of another Indian. (Act of 1834, as reproduced in Revised Statutes, section 2146.) But whilst it is also admitted that in the present case the place in which the crime was committed is Indian country, and that the prisoner and the deceased are in general tribal Indians, yet it is suggested that, inasmuch as the deceased belonged to a tribe with which the United States have expressly stipulated, that "if bad men among the whites or among other people subject to the authority of the United States shall commit any wrong upon the person or property of the Indians, the United States will, &c., cause the offenders to be arrested and punished according to the laws of the United States," &c. (15 Stat., 593), that this provision excludes Arapahoe Indians from that class which by the above statute is out of the protection of the criminal laws of the United States, and so brings crimes against them within section 2145.

The argument seems to be that Indians committing crimes within the Indian country, generally, are subject to the jurisdiction of the criminal laws of the United States; that their exemption therefrom in certain specified cases is not their privilege, but a privilege of the United States, depending upon the unwillingness of the latter to guarantee the peace in favor of certain persons described as *Indians*; but that in the present case, by reading the statute and treaty together as contexts, it is plain that the United States intend to guarantee the peace in favor of the Arapahoes, and, therefore, that those are no longer included within the word "Indians" in section 2146.

No doubt there is some ground for this contention, in the general intent of the "bad-men" clause in the above and other Indian treaties, *i. e.*, the intent to prevent the atrocities and expensiveness of Indian wars, by providing that instead of an application of Indian law, or rather *avenging outrage*, to the redress of offenses committed by members of other tribes, the United States depart from their general policy, and assume such redress themselves.

There is great difficulty, however, in holding that the treaty enlarges the scope of the criminal laws of the United States, as such scope might have been defined immediately preceding the ratification of the treaty. Admitting, as it seems fair to do, that the status of the criminals referred to in the bracketed clause of section 2146 depends upon an exceptional reason, he himself, as well as the *locus in quo*, being subject to the sovereign jurisdiction of the United States, and his exemption depending solely upon the character of the party injured; and admitting also that the reason of that exemption is one that does not appear to apply to the deceased, yet I do not see how a court can vary the meaning of the statutory word "Indian" by an implication, so as to say that it excludes members of tribes who are parties to treaties containing what may be termed the "bad-men" provision, as above illustrated. For reasons not expressed, Congress has chosen to exclude persons termed "Indians" from certain forms of protection. This positive enactment may extend beyond the original reason therefor. That is often the case with statutes. In these cases they operate according to the force of the words, and not according to their original reason of existence. Positive statutes are not repealed by the mere cessation of what may be concluded to have been the purpose for which they were enacted. Congress has chosen to define the person—crime against whom by an Indian in the Indian country shall not be taken cognizance of by the courts of the United States—by the word "Indians," and it seems that no change of status which occurs to one who notwithstanding remains an *Indian* will prevent the application to him of that definition.

The case seems the stronger because the very treaty which is cited itself denotes the persons who shall be entitled to its privileges as "Indians." If in establishing their title to these privileges they show themselves entitled to the above appellation, do they not take it *cum onere* throughout that legislation, and all other connected with it?

This case appears to be governed by Perryman's, 100 U. S., 235, where the question was whether the great changes made by constitutional amendments, &c., in the condition of negroes, rendered them liable, under sections 2154, 55 (R. S.), to make restitution for property stolen from Indians. The word used by the section (also originally a part of the act of 1834) to denote a party thus to be liable is "white person." The reason for making such distinction between *whites* and *blacks* in 1834 is obvious, and as obviously had ceased at the time (1875) when the suit in question had been brought. Still the court held that the force of the terms originally used by the legislature in giving form to its will could not be avoided; and that until it chose to accommodate that form to the general effect of subsequent legislation, constitutional and other, none but one who is *white*, in the usual sense of the word, can be liable to make restitution.

The case here is *vice versa*; *i. e.*, whether one who was originally *within* the scope of a statutory term, for all purposes, and who in the ordinary use of words remains so

still, can, by the indirect effect of certain legislation which has removed reasons that were of great weight in molding the statute in question, be now excluded from such term?

I therefore greatly doubt whether the treaty in question can be regarded as going beyond its direct terms, *i. e.*, as not only affording the protection of laws otherwise existing, but also *enlarging* the protective operation of those laws.

Having thus expressed myself, I will add that notwithstanding the above doubts, if it occurs to you as in point of administration a matter of importance that the opinion of *the courts* shall be taken upon this matter in the course of a vigorous prosecution of the "crime," I recognize the embarrassments of the case as so considerable that I will cheerfully execute whatever suggestions you may be pleased to make. Such prosecution, whatever be its issue, might more effectively call the attention of Congress to the general subject, which indeed seems to require further legislative consideration.

It may indeed be no more than proper deference to the opinion of Judge Moody in the case of Crow Dog (cited by you) to take this step, particularly in view of the peculiar circumstance now stated by you *viz*, that the Pottawatomie Indians have no law that covers a crime of this sort, although committed within their boundaries.

2. If no demand for Foster's surrender shall be made by one or other of the tribes concerned, founded fairly upon a violation of some law of one or other of them having jurisdiction of the offense in question according to general principles, and by forms substantially conformable to natural justice, it seems that nothing remains except to discharge him.

A fruitless prosecution in the courts may be the best warrant for that, in view of the great outrage committed by the prisoner; one so well calculated to rouse and to render discontented the communities concerned therein.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE INTERIOR.

During my absence this case was sent to the Solicitor-General. The opinion he has here given I have examined and considered, and I unite with him in all of the conclusions he has arrived at, and so approve this opinion.

BENJAMIN HARRIS BREWSTER,
Attorney-General.

JULY 2, 1883.

DEPARTMENT OF THE INTERIOR,
Washington, July 24, 1883.

SIR: Referring to letter of this Department of 15th ultimo, inviting attention to the case of Johnson Foster, a Creek Indian, who was arrested and placed in the guard-house of the post, at Fort Reno, Ind. Ter., for the murder of one Poisal, an Arapahoe, on the Pottawatomie Indian reservation in said Territory, also to your reply of June 27, 1883, and the views therein expressed, I have the honor to transmit herewith for your consideration a copy of communication of 18th instant from the Office of Indian Affairs, and an extract from report of Agent Miles, of Cheyenne and Arapahoe Agency, Indian Territory, for the current month, from which it appears that said Foster is in the custody of the civil authorities at Fort Smith, Ark., having been surrendered to a United States deputy marshal on charges of horse-stealing, &c., by the military at Fort Reno.

In view of the opinion contained in the concluding portion of your communication of 27th ultimo, the Indian Office recommends that the case be brought to trial in the proper United States district court; and appreciating the importance of a judicial opinion in the premises, I respectfully ask that the United States district attorney for Kansas be requested to take such steps as may be necessary for the trial of the case before the United States district court at Wichita, Kans., within whose jurisdiction the offense was committed. (22 Stat., 400.)

In this connection I beg to invite attention to sections 2152 and 2153 Revised Statutes of the United States, which may perhaps be found by you to have some bearing upon this case.

Very respectfully,

M. L. JOSLYN,
Acting Secretary.

The ATTORNEY-GENERAL.

UNITED STATES INDIAN SERVICE,
CHEYENNE AND ARAPAHOE AGENCY,
Darlington, Ind. T., July 2, 1883.

SIR: * * * *

"Johnson Foster, the Creek Indian, who murdered Robert Poisal, a half-blood Arapahoe Indian, last fall, was removed from the guard-house at Reno during the month by a deputy United States marshal from Fort Smith. I understand he will be tried for "horse-stealing" and "introducing" (old charges), and not for the murder of Poisal. This is a very unsatisfactory move for the Arapahoes, as they expected that he would be tried for murder and be hung. The deputy secured a strong guard of troops from Reno to assist in escorting the murderer beyond the limits of the agency, and notwithstanding the guard a small party of young Arapahoes made a bold dash on the party when about 15 miles out from the agency and were very near successful in "getting their man," but finally abandoned the attempt. We should have a law to punish Indians for committing offenses upon Indians, no matter what may be their status.

* * * *
Very respectfully,

JNO. D. MILES,
Indian Agent.

Hon. H. PRICE,
Commissioner, Washington, D. C.

DEPARTMENT OF THE INTERIOR, OFFICE OF INDIAN AFFAIRS,
Washington, July 18, 1883.

SIR: I have the honor to acknowledge the receipt, by Department reference, of a communication from the honorable Attorney-General, dated 27th ultimo, in reply to Department letter of the 15th ultimo, requesting (at the suggestion of this office) a reconsideration of the question of jurisdiction by the United States courts in the case of Johnson Foster, a Creek Indian, now in confinement at Fort Reno, Ind. T., charged with the willful murder of Robert Poisal, a half-breed Arapahoe in the Pottawatomie country, on the 18th September, 1882.

The honorable Attorney-General, after reconsidering the matter, is still of opinion that there is but little ground to hope that the United States courts have jurisdiction of the offense in question; but, recognizing the embarrassments of the case, states that if it occurs to you as in point of administration a matter of importance that the opinion of the courts shall be taken upon the matter in the course of a vigorous prosecution of the crime, he will cheerfully execute whatever suggestions you may be pleased to make. Such prosecution, whatever be its issue, might, the Attorney-General observes, more effectually call the attention of Congress to the general subject, which seems to require further legislative consideration. The honorable Attorney-General adds that it may, indeed, be no more than proper deference to the opinion of Judge Moody, in the case of Crow Dog, cited, to take this step, particularly in view of the peculiar circumstance now stated, viz, that the Pottawatomie Indians have no law that covers a crime of this sort, although committed within their boundaries.

In view of these suggestions, and in order to relieve this Department, and the Department of War having charge of the prisoner, of further responsibility in the premises, I have the honor to recommend that the honorable Attorney-General be requested to cause the necessary instructions to be given to the United States attorney for the western district of Arkansas for the removal of the prisoner, Johnson Foster, from Fort Reno to Fort Smith, Ark., and for his trial there for the offense of which he stands charged in the United States court.

A copy of this letter is inclosed.

Very respectfully, &c.,

E. L. STEVENS,
Acting Commissioner.

The SECRETARY OF THE INTERIOR.

DEPARTMENT OF JUSTICE,
Washington, July 30, 1883.

SIR: I have this morning received yours of the 24th instant, relating to the case of Johnson Foster, the Creek Indian, together with its inclosures.

These papers I have forwarded to the United States attorney for Kansas, and have at

the same time instructed him, as you request, to take steps for prosecuting Foster for the murder of Poisal, before the United States court at Wichita, Kans.

Very respectfully,

S. F. PHILLIPS,
Acting Attorney-General.

SECRETARY OF THE INTERIOR.

DEPARTMENT OF JUSTICE,
Washington, July 30, 1883.

SIR: You will receive herewith inclosed, copies of certain correspondence betwixt this office and the Department of the Interior, in respect to the case of Johnson Foster, a Creek Indian, charged with the murder of one Poisal, an Arapahoe, in the Pottawatomie Reservation in the Indian Territory. This correspondence it is hoped will fully explain itself, and will present to you the grounds upon which you are hereby instructed "to take such steps as may be necessary for the trial of the case before the United States district court at Wichita, within whose jurisdiction the offense was committed."

Although it is right that you should at once be apprised of the difficulties which have occurred to the Attorney-General when called to advise the Secretary of the Interior, yet it is hoped that you may be able to see a way out of them, and to establish a *jurisdiction* in the above court for the punishment of what appears to be a great outrage upon the peace of the Indian tribes.

Very respectfully,

S. F. PHILLIPS,
Acting Attorney-General.

J. R. HALLOWELL, Esq.,
United States Attorney, Topeka, Kans.

TOPEKA, KANS., *August 14, 1883.*

DEAR SIR: I am in receipt of your letter of July 30, inclosing copies of correspondence between the Department of the Interior and the Department of Justice, in regard to the case of Johnson Foster, a Creek Indian, charged with the murder of one Poisal, an Arapahoe in the Pottawatomie Reservation in the Indian Territory, together with your instruction in regard to the prosecution of this case in the Wichita court. I am compelled, after a thorough examination, to hold with Mr. Clayton, district attorney of the western district of Arkansas, that the United States courts have no jurisdiction. But, following out your instruction, I will send for Foster, present the case to the grand jury, and, if indicted, will prosecute the case.

Yours, very respectfully,

J. R. HALLOWELL,
United States District Attorney.

Hon. S. F. PHILLIPS,
Acting Attorney-General, Washington, D. C.

○